gagement was to answer for the debt of a third party, the promisor being under no obligation to the promisee other than that incurred by the promise of indemnity. And on this ground the decision is based. The leading case of *Thomas* v. *Cook*, *supra*, involved a promise to a co-surety, as did *Apgar's* case, and recovery was allowed, but in *Green* v. *Cresswell* (1839) 10 A. & E. 453, where the statute was applied, there was no relation of co-suretyship. These two cases have been said to be distinguishable on the ground taken in the principal case. *Green* v. *Cresswell*, however, is generally considered to have been over-ruled by modern holdings. The alleged distinction seems, at best, of doubtful validity, for, where the promise is made to one who becomes a co-surety, as well as in the other case, the promisor enters into an engagement which he would not enter into but for the purpose of assisting the third party; and he would be under no obligation to contribute, as co-surety, except for the relationship which he established in order that he might secure credit for the debtor.

The "debt of another" of the statute must be one due the promisee. It is asserted that in these cases of indemnity the debt which the defendant engages to discharge is that implied obligation of the third party to the promisee which arises on the making of the parol promise, but it may well be doubted whether the statute was intended to include in its operation an obligation of a third person which exists or is to exist solely by virtue of and as incidental to the special contract which the plaintiff seeks to enforce. Browne, St. Fr. (5th ed.) § 162.

In the principal case the court considered itself free to take either position; in holding the defendant's promise an engagement to answer for the debt of another within the meaning of the statute, it seems to have disregarded the modern principle of construction of that statute.

LIABILITY TO THIRD PERSONS FOR INJURIES RESULTING FROM A BREACH OF CONTRACT.—It often happens that one of two contracting parties so negligently performs his contract that a third person who is not a party to the contract, is injured. The question whether such third person may or may not maintain an action against the one who committed the breach has given much concern to the courts of both England and the United States. In a leading English case, *Winterbottom* v. *Wright* (1842) 10 Mees. & W. 109, the defendant had contracted with the postmaster-general to provide a mail coach for carrying the mail bags, and to keep the coach in repair and fit for use. Other persons had contracted with the postmaster-general to supply horses and driver for the coach. The coach broke down and the driver was injured by reason of the defendant's failure to keep it in proper repair. The court held that the driver could not recover, on the ground that there was no privity of contract between the parties and hence no duty owing to the plaintiff by the defendant. "If the plaintiff can sue," said Lord ABINGER, C. B. (at p. 114), "every passenger, or even any person

passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit would ensue."

This was at least a perfectly comprehensible and easily defined principle; but it was not long before an important exception to the rule was introduced. In *Thomas* v. *Winchester* (1852) 6 N. Y. 397, a dealer in drugs and medicines carelessly labeled belladonna, a deadly poison, as dandelion, a harmless medicine, and sent it so labeled into the market. After it had passed through the hands of several intermediate dealers it was purchased by the plaintiff's husband for her use, and she was injured. The question was raised whether the absence of privity between the parties would defeat the action. The court recognized the general rule as laid down in *Winterbottom* v. *Wright, supra,* and apparently approved of that decision on the ground that in such a case misfortune to third persons not parties to the contract would not be a natural and necessary consequence of the defendant's negligence. But it thought the case in hand stood on a different ground. "The death or great bodily harm of some person was the natural and almost inevitable consequence of the sale of belladonna by means of the false label." This rule, that a man is liable to third persons for his negligence in dealing with articles imminently dangerous, has been adopted generally in this country, and has some support in England. *Norton* v. *Sewall* (1870) 106 Mass. 143; *Parry* v. *Smith* (1879) L. R. 4 C. P. D. 325. It has been held to apply to negligence in the construction of a scaffold ninety feet above the ground. *Devlin* v. *Smith* (1882) 89 N. Y. 470.

Up to this point therefore, the rule appears to be well established that C cannot recover for A's negligence in performing a contract with B unless the negligence was in dealing with articles imminently dangerous to human life. There are, however, a few cases which it does not seem possible to bring within this rule. In *Schubert* v. *J. R. Clark Co.* (1892) 49 Minn. 331, the plaintiff was injured by the breaking of a step ladder which was defectively constructed by the defendant. There was no privity between the parties, and yet the defendant was held liable ostensibly on the ground that the negligence was such as to "expose another to great bodily harm." But it can hardly be said that a defective step ladder is more dangerous to human life than was the defective stage coach in *Winterbottom* v. *Wright* or a defective lamp as in *Longmeid* v. *Halliday* (1851) L. R. 6 Ex. 761. Another exceptional case is that of *George* v. *Skivington* (1869) L. R. 5 Ex. 1, where the plaintiff was allowed to recover for injuries received from using a hair wash bought by the plaintiff's husband from the defendant, who was its sole manufacturer. The defendant knew that the wash was intended for the plaintiff and for that reason, the court said, a duty arose toward the plaintiff for the breach of which she could recover. And in a case recently decided by the Supreme Court of Minnesota

it was held that a railway carrier transferring a car of its own to a connecting carrier for use upon its line owes to the servants of the latter the duty of exercising due care in inspecting and putting the car in a reasonably safe condition for the proposed use, *Teal* v. *American Mining Co. et. al.* (Minn. Nov. 1901) 87 N. W. 837, affirming the doctrine of *Moon* v. *Northern Pacific R. Co.* (1891) 46 Minn. 106. This shows that the tendency to break away from the stringency of the rule in *Winterbottom* v. *Wright* must still be reckoned with.

Not one of these three cases can be said to come fairly within the exception established by *Thomas* v. *Winchester*, and they must either be classed as anomalies or else some new principle must be admitted to include them. The latter course was attempted by BRETT, M. R., in *Heaven* v. *Pender*. The defendant supplied and erected a staging round a ship under a contract with the ship owner. The plaintiff was employed by the latter to paint the ship and in the course of his work fell from the staging and was injured by reason of its defective condition. The divisional court on the authority of *Winterbottom* v. *Wright* held that the defendant owed no duty to the plaintiff and was therefore not liable. (1882) 9 Q. B. D. 302. This decision was reversed by the Court of Appeal. (1883) 11 Q. B. D. 506. COTTON and BOWEN, L. JJ., put the decision on the narrow ground that the defendant, who was dock owner having control of vessels brought there for painting and repairs, should be considered as having invited the plaintiff to usethe dock and all appliances and as therefore owing him a duty to use reasonable care that such appliances should be in a fit state. BRETT, M. R., however, preferred to lay down a broader principle which he thought would include most of the exceptional cases. His view, as adopted by a leading American text-book writer, is: "Where in omitting to perform a contract, in whole or in part, one also omits to use ordinary care to avoid injury to third persons, who as he could with a slight degree of care foresee, would be exposed to risk by his negligence, he should be held liable to such persons for injuries which are the proximate result of such omission." 1 Shearman & Redfield, Negligence, 5th ed. § 116. The step ladder case, *George* v. *Skivington* and *Teal* v. *Mining Co.*, all come within this rule as cases where the defendant must have foreseen that third parties would be exposed to great risk by their want of ordinary care.

This test is, however, criticized by an English writer. 1 Bevan, Negligence, 72. The cases, Mr. Bevan thinks, established the rule that the defendant is liable whenever his act naturally and necessarily unless diverted works injury to another, except where there intervenes a conscious agency which should have averted the mischief. To support *Winterbottom* v. *Wright* on this principle he finds it necessary to assume that the postmaster-general should have discovered the defect (p. 64). This fact does not appear from the case and it seems from the reasoning of the court that it was not the ground of its decision. In *Losee* v. *Clute* (1873) 51 N. Y.

494, where the plaintiff was injured by the bursting of a boiler manufactured by the defendant, it was admitted that the defect in the boiler was a hidden one which could not have been discovered by the intermediate persons with ordinary care. In *Curtin* v. *Somerset* (1891) 140 Pa. St. 70, a contractor who had built a hotel veranda was held not liable to one injured by reason of its imperfect construction. The plaintiff insisted that since the hotel proprietor was not responsible the contractor must be, but the court refused so to regard it.

A third suggestion is that of Sir Frederick Pollock. Torts, 5th ed. (1897) 514. The cases of *Winterbottom* v. *Wright* and *Longmeid* v. *Halliday* he thinks prove no more than that "If A breaks his contract with B (which may happen without any personal default in A or A's servants) that is not of itself sufficient to make A liable to C, a stranger to the contract, for consequential damage." But if "bad faith or misfeasance by want of ordinary care" is shown, " or it may be if the chattels in question had been of the class of imminently dangerous things which a man deals with at his peril," the result will be different. Applying this rule, we find that in the step ladder case, where a recovery was allowed, both bad faith and want of ordinary care were shown, whereas in *Losee* v. *Clute* the defect was of a nature extremely difficult to guard against. In *Heizer* v. *Kingland Co.* (1892) 110 Mo. 605, where the plaintiff was not permitted to recover against the manufacturer of a defective threshing machine, the court intimated that the result would have been different if the defendant had known or should have known of the existence of the defect. There was proved neither bad faith nor want of ordinary care. In *Teal* v. *Mining Co.* the defendant carrier knew that the car which it transferred to the plaintiff's employer was unsafe by reason of a defective brake wheel. There was therefore want of ordinary care if not positive bad faith. In *Sweeney* v. *Rozell* (Sup. Ct. App. Term, 1900) 64 N. Y. Supp. 721 the defendant, under a contract with the plaintiff's master, furnished hoisting appliances to be used in storing away bales of hay sold by the defendant. One of the ropes used was frayed and unfit for the purpose; it broke and a bale of hay fell and injured the plaintiff. The court held that the defendant owed the plaintiff the duty of using ordinary care to see that the appliances furnished were reesonably safe; but that it was not enough to enable the plaintiff to recover for him to show that the rope was frayed and imperfect—it must also appear that the defendant had omitted to use ordinary care to discover its condition.

On the whole therefore, Sir Frederick Pollock's statement of the rule seems to furnish the best possible explanation of the tendency of the modern cases, though apparently it is opposed to the spirit, at least, of the decisions in *Winterbottom* v. *Wright* and *Curtin* v. *Somerset*.

LOCATION OF CHATTELS AS A TERM IN AN INSURANCE POLICY.—A statement of location in an insurance policy is capable of three